State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

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A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on SEP 3 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HLT 739-01

AGENCY DKT. NO. 00B-126

IN THE MATTER OF MONOC

Morna L. Sweeney, Esq., for petitioner (Kalison, McBride, Jackson & Murphy, attorneys)

Douglas Alba, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: August 16, 2002 Decided: August 27, 2002

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE

This matter arises pursuant to Petitioner, the Monmouth-Ocean Hospital Service Corporation's (MONOC's), request for a fair hearing to determine whether the assessment of penalties proposed by Respondent, the Department of Health and Senior Services (Department), is justified. The assessment arises from MONOC's employment of an uncertified emergency medical technician (EMT), Brian Farry.

PROCEDURAL HISTORY

On January 18, 2001, Respondent notified Petitioner by Notice of Assessment that MONOC had violated two provisions of the Manuals of Standards for Licensure of Mobility Assistance Vehicle and Ambulance Services, *N.J.A.C.* 8:40, imposing a fine of $115,000. Following receipt of the notice, MONOC timely answered and requested that the matter be transferred to the Office of Administrative Law (OAL). On March 7, 2001, the OAL received the matter and both parties agreed to a stipulation of facts and that a plenary hearing would not be necessary since there were no issues of material fact. Both parties submitted legal briefs and oral argument was heard on August 16, 2002.

FINDINGS OF FACT

The parties have provided a stipulation of facts that is incorporated by reference into this Initial Decision and is attached hereto as Exhibit A. An overview of the facts is set forth below.

In October 1999, Brian Farry applied to MONOC, a not for profit ambulance provider, for a position as a Basic Life Support provider. At the time of Farry's application, MONOC had in place a four-prong process intended to elicit and verify job applicants' credentials. Most importantly, MONOC had contracted with an outside service, Dataline, to perform background checks on all prospective hires which service included verification of applicants' credentials. Farry represented to MONOC that he had a current certification as an EMT-D. Dataline represented to MONOC that it confirmed Farry's credentials with the State Board of Emergency Medical Technician.

Based on Farry's representations and Dataline's purported verification, MONOC hired Farry. His employment as an EMT commenced on November 14, 1999. On October 3, 2000, the Department received an anonymous call alleging that Farry was uncertified as an EMT-D. On behalf of the Department the Office of Emergency Medical Systems (OEMS) investigated the allegation. OEMS found that Farry was not certified as an EMT-D, having twice failed the examination. OEMS found that although MONOC was in possession of Farry's EMT-V and professional rescuer CPR certification cards, it did not have on file a copy of an EMT-D

certification for Farry. OEMS further found that, while employed by MONOC, Farry acted in the capacity of an EMT-D on at least 115 days from December 3, 1999 to October 2, 2000. Based on the OEMS investigation, Farry's employment with MONOC effectively ended on October 6, 2000.

Following the Farry discover, MONOC immediately took steps to ensure that its employees were all properly certified and trained. MONOC also undertook steps to ensure that its hiring and verification process could not be undermined again. For instance, MONOC ceased using Dataline and now has a procedure by which it confirms an applicant's credentials directly with the Department. Additionally, MONOC voluntarily reimbursed Medicare $27,841.78 representing the sum of each claim paid for services rendered, despite the fact that it was determined in each instance that Farry rendered service without incident and when he was accompanied by a duly certified EMT.

ANALYSIS

The Department contends that MONOC violated the following regulations:

N.J.A.C. 8:40-3.7(c), which provides:

> Each person who provides patient care (as part of any services under this chapter (Chapter 40)) shall possess a license, registration, certification or training certificate valid in the State of New Jersey for the type or level of patient care he or she is providing. No person shall be allowed to provide a type of level of patient care beyond the level he or she is lawfully eligible to provide in the State of New Jersey; and

N.J.A.C. 8:40-3.7(h)1 further provides:

> When in-service, each Emergency Ambulance Vehicle shall be staffed by at least two persons . . .
>
> 1. Each of the required staff persons shall possess a current valid certification as an Emergency Medical Technician, issued by or recognized by the Department.

Pursuant to *N.J.S.A.* 26:2H-14 and *N.J.A.C.* 8:40-2.15(b) violations are considered as a single, different occurrence for each calendar day the violation occurs or remains uncorrected.

Therefore, pursuant to *N.J.A.C.* 8:40-2.14(b) and *N.J.A.C.* 8:40-2.14(e)3, MONOC was assessed a penalty of $500 per day per violation ($1,000 per day) for a total penalty amount of $115,000.

MONOC asserts that the calculation of the penalty is inconsistent with the narrative description of the penalty in the January 18, 2001, Assessment Notice and that, nonetheless, the penalty imposed is excessive, arbitrary and capricious.

First, MONOC contends that the penalty should have been half since the Notice stated that the penalty would be $500 per day. However, the Notice also says that the penalty would be per day and for each violation and cites two different regulatory violations. Accordingly, I **FIND** the Notice adequate and not a violation of Due Process.

MONOC contends that based on previous penalties the Department has assessed against other providers that the fine should be reduced. MONOC cites a Notice of Proposed Assessment of Penalties against Woodbury TLC Transport Services in support of the argument that the proposed $115,000 fine should be reduced. In the Woodbury case the Department assessed a total $1,000 fine arising from two of Woodbury's employees' lack of certification in CPR for a total of 161 days. The Department argues that the Woodbury case contains a set of different facts than the instant matter and should not be considered persuasive. In addition, the Department cites a Notice of Proposed Assessment of Penalties in the case involving Mobility Assistance Vehicle and BLS Ambulance Service Provider to support its position that an $115,000 fine in the instant matter is reasonable.

While both the above-cited cases are instructional, I do not find their rulings binding in any way since they involve a whole set of different facts than the instant matter and may even involve other factors not contained in the reported Notice. I do find them instructional in the sense that the cases clearly show that the Department is not bound by the $500 per day per violation regulations. Counsel for the Department admitted at oral argument that the Department does have discretion in imposing a penalty.

As for the amount of the penalty, the Department contends the full regulatory amount, $115,000, is appropriate since it is ultimately MONOC's responsibility to ensure that individuals

it employs meet the State's certification requirements. MONOC's procedure to verify certification was lacking and, according to the Department, MONOC must bear responsibility for the consequences. The deficiency here, among other things, in MONOC's procedure was in not requiring or demanding an actual certificate from Farry of the alleged EMT-D certification.

MONOC, on the other hand, claims that the $115,000 penalty should be reduced because it exercised its best efforts to ensure that employees were duly certified. MONOC claims that it is now being penalized because of the failures of Dataline and one of its own employees who failed to secure the certification from Farry. MONOC also sites to the fact that it acted immediately to mitigate against this event and future consequences. Further, MONOC voluntarily disgorged itself of all the benefits paid by Medicare for ambulance services rendered in which Farry was a participant.

It is appropriate to look to the factors enunciated in *Kimmelman v. Henkels & McCoy, Inc.*, 108 *N.J.* 123 (1987), in determining the amount of the penalty. A consideration of these factors leads me to conclude that the amount of the penalty should be reduced. Importantly, I find that MONOC at no time acted in bad faith, rather it appears to have been merely negligent. MONOC did not act out of economic advantage in the hiring of Farry. Moreover, it appears that there has been no injury to the public as a result of this violation. MONOC also has demonstrated its desire to ensure this violation does not occur again and, MONOC's repayment of Medicare benefits evidences a sincerity to avoid future violations. These mitigating factors, when combined with the Department's mandate to ensure the high quality of health services, leads me to conclude that a penalty of $28,750 is appropriate. This amount represents a quarter of the penalty sought by the Department and is appropriate given the reasons set forth above and MONOC's not for profit status.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that MONOC pay a penalty of $28,750 to the Department. I also **ORDER** that should the immediate payment of this amount prove infeasible, a reasonable payment schedule be considered by the Department.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SENIOR SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SENIOR SERVICES**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Health and Senior Services does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SENIOR SERVICES, John Fitch Plaza, PO Box 360, Room 805, Trenton, New Jersey 08625-0360**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/27/2002
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

8/30/02
DATE

DEPARTMENT OF HEALTH AND SENIOR SERVICES

Mailed to Parties:

SEP 3 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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